No. 410

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

AMERICAN AIRLINES, INC., *Petitioner,*

v.

NORTH AMERICAN AIRLINES, INC., *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

HOWARD C. WESTWOOD,
J. RANDOLPH WILSON,
701 Union Trust Building,
Washington 5, D. C.,
Attorneys for Petitioner.

COVINGTON & BURLING
Of Counsel.

INDEX

CITATIONS

Cases:

Page

Statutes:

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 410

AMERICAN AIRLINES, INC., *Petitioner,*

v.

NORTH AMERICAN AIRLINES, INC., *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In this brief, North American Airlines, Inc., will be referred to as the respondent, its brief will be cited as "Resp. Br.", and the brief of the Solicitor General will be cited as "Sol. Gen. Br."

In an Appendix hereto the petitioner treats certain irrelevant matter, outside the record, which the respondent's brief discusses under the heading, "A Preliminary Observation." Resp. Br., pp. 11-17.

I

THE APPLICATION OF KLESNER TO THIS CASE

The respondent now sweeps out of this case the contention that the *dictum* in the *Gratz* case is still the law. Resp. Br., p. 44. Nor is there, in respondent's argument here, any contention that a showing of loss of business by the petitioner is requisite to the validity of the Board's order. In both respects the respondent here sharply departs from the argument it had consistently made both before the Civil Aeronautics Board and before the lower court and which the lower court adopted in its opinion. *Infra*, p. 11.

The respondent now constructs its argument entirely from the doctrine of the *Klesner* case.

A. THE RESPONDENT OVERSTATES THE SIGNIFICANCE OF THE KLESNER DOCTRINE

There is, of course, no question but that, as the respondent says, the Federal Trade Commission conscientiously determines whether a Section 5 proceeding would be in the interest of the public; and often decides not to file a complaint, or decides to dismiss a complaint, upon reaching the view that no public purpose would be served by a proceeding. Resp. Br., pp. 21-23, 29-30. This is altogether proper—and not only the Trade Commission but other administrative agencies, to say nothing of the prosecuting authorities in the Department of Justice in their sphere of action, should thus seek to adhere to their obvious duties as public servants.

But the very nature of the administrative function involved in determining whether there is a public purpose to be achieved in an administrative proceeding

is not the sort which courts are especially equipped to review. What has happened in the application of *Klesner* in court review of Trade Commission orders seems to demonstrate this, and fully to explain Judge Learned Hand's doubt that the *Klesner* case would be decided the same way today. Pet. Br., p. 36.

The respondent has not pointed to a single case where a Trade Commission order has been reversed in reliance upon *Klesner*. Even in *Flynn & Emrich Co.* v. *Federal Trade Commission*, 52 F. 2d 836 (4th Cir. 1931)—the nearest there is to such a case—the discussion of *Klesner* was, at most, an alternative holding, and certainly was largely affected by the court's prior finding that there was no evidence whatever of bad faith in threatening patent infringement suits —which, on the facts in that particular case, was essential to show an unfair method of competition.

In *Motion Picture Advertising Service Co.* v. *Federal Trade Commission*, 194 F.2d 633 (5th Cir. 1952), so emphasized by the respondent, the court reversed the Commission on the ground that there was no showing of a Section 5 violation. Only by *obiter* did it suggest that the case might fall also on *Klesner* grounds. But, when the case reached this Court, the lower court was reversed on its determination that there was no Section 5 violation and this Court's opinion did not even mention the separate *Klesner* point. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953).

What appears to be happening is that, more and more, there is a tendency to hold that, if there is an unfair practice or method of competition, it is in the public interest to order it stopped. See, *e.g.*, *E. B.*

Muller & Co. v. Federal Trade Commission, 142 F. 2d 511 (6th Cir. 1944), where, at p. 520, the court said:

> "The record clearly shows that the petitioners have resorted to unfair and illegal practices within the meaning of the Act. Hence the proceeding aimed to suppress the practices is 'in the interest of the public'. Federal Trade Commission v. R. F. Keppel & Bro., 291 U.S. 304, 54 S. Ct. 423, 425, 78 L. Ed. 814. Cf. National Broadcasting Co. v. United States, 319 U.S. 190, 224, 63 S. Ct. 997, 87 L. Ed. 1344, construing a similar provision of the Communications Act."

And see *Gimbel Bros. v. Federal Trade Commission*, 116 F. 2d 578, 579 (2d Cir. 1941); *cf. Parke, Austin & Lipscomb v. Federal Trade Commission*, 142 F. 2d 437, 441 (2d Cir. 1944). Indeed, Mr. Justice Stone's language in the *Keppel* case apparently was construed by the court in the *Muller* case to mean that "if the practice is unfair" the proceeding to suppress it is "to the interest of the public." 291 U.S. at 308.

Be that as it may, it would certainly be of dubious wisdom to apply *Klesner* as the respondent and the lower court would have it applied—as giving warrant to a court to second guess the agency on its administrative determination. That is not what *Klesner* held; and that is certainly not what the courts have done with *Klesner*.

B. THE KLESNER DOCTRINE IN ANY EVENT SHOULD BE INAPPLICABLE IN THE CONTEXT OF THE CIVIL AERONAUTICS ACT

Like the Trade Commission, the Civil Aeronautics Board, of course, should be moved by considerations of concern to the public.

But air carriers were removed from the scope of Section 5 of the Trade Commission Act, and the matter of unfair practices and methods of competition dealt with in the Civil Aeronautics Act, because the latter Act was intended as a complete and integrated pattern of specialized administrative regulation, with responsibility in the Board to mesh, coordinate, and administer the regulation in the light of the peculiar conditions of air transportation and of the unique public interest in the carriers making up that industry.

In this context, it does seem well nigh impossible for a court to apply the "interest of the public" standard as a *judicial* question. Just as the comparable standard in the Communications Act was held by this Court to be one for the administrative agency to apply, *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943), so here the agency to which Congress specifically granted the power must be the one to determine its exercise. Sol. Gen. Br., p. 19, n. 9.

Competitive practices among airlines are of far greater concern to the public than are the competitive practices, found to be of public concern, of a chain store selling radio and auto accessories,[1] a department store,[2] a wellpoint manufacturer,[3] some flour blenders,[4]

[1] Pep Boys—Manny Moe & Jack v. Federal Trade Commission, 122 F.2d 158 (3d Cir. 1941).

[2] Gimbel Bros. v. Federal Trade Commission, 116 F. 2d 578 (2d Cir. 1941).

[3] Moretrench Corp. v. Federal Trade Commission, 127 F.2d 792 (2d Cir. 1942) (a "wellpoint" is a highly specialized type of pump used to drain wet ground prior to building on it).

[4] Federal Trade Commission v. Royal Milling Co., 288 U.S. 212 (1933).

a correspondence school serving Latin Americans,[5] or a seller of local movie advertisements.[6] Common carrier air transportation is an essential national utility on which the public becomes every day more dependent. Even if a court is competent to draw a distinction between the public interest and the private interest in a spiteful squabble between two shade shops in one city or in the devices used to wheedle business from five purchasers of coal stokers, *cf. Flynn & Emrich Co.* v. *Federal Trade Commission*, 52 F.2d 836, 838-839 (4th Cir. 1931), it does not follow that a court is in a position to overrule the determination of the agency on that question where the competition is for extensive common carrier patronage from coast to coast.

The respondent admits that the Civil Aeronautics Board is meant by Congress to have a special competence "in matters concerning air traffic . . . generally". Resp. Br., p. 41. So it is. And there is no matter more directly concerning air traffic than the means employed to solicit it.

The respondent seeks to avoid the force of this consideration by pointing to the fact that "equity courts have developed an entire branch of jurisprudence" in the field of trademarks and trade name infringement (and urging that the Civil Aeronautics Board is altogether inexpert in that field. Resp. Br., p. 42. But that quite misses the point. The issue with which the *Klesner* case was concerned was not a matter of the private law of trade name infringement or even of the

[5] Branch v. Federal Trade Commission, 141 F.2d 31 (7th Cir. 1944).

[6] Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953).

substantive content of statutory unfair methods of competition. This Court, indeed, was at pains, in its opinion in that case, to make it clear that it was not dealing with any such question. 280 U.S. at 25. The *Klesner* issue, rather, is what is "in the interest of the public". That is a question with which the "branch of jurisprudence" referred to by the respondent has absolutely nothing to do. In the *Klesner* sense, that particular question never arises before the equity courts. The real expert on that question, in the aviation field, is the Civil Aeronautics Board; a court would have to go far outside its normal competence to attempt to answer it.

C. WHATEVER MAY BE THE PROPER APPLICATION OF THE KLESNER CASE TODAY, THE BOARD'S FINDINGS AND ORDER FULLY COMPLY WITH ITS REQUIREMENTS

The respondent argues that *Klesner* somehow means that there is no public interest in a question involving trade names, and that any such question should be excluded entirely from the scope of Section 5 of the Trade Commission Act and Section 411 of the Civil Aeronautics Act.

The respondent's brief states the point variously, but apparently concedes that, *if there were fraud*, a trade name case would raise a question under Section 5 or Section 411. This concession is a curious effort to re-introduce, in this particular area, the *Gratz dictum* which even the respondent repudiates. It is hardly necessary to point, again, to the irrelevance of fraud. "The purpose of the statute is protection of the public, not punishment of a wrongdoer," and the innocence of the respondent is quite beside the point. *Gimbel Bros.* v. *Federal Trade Commission*, 116 F. 2d

578, 579 (2d Cir. 1941); Sol. Gen. Br., p. 13; Pet. Br., pp. 21-22. The harm to the confused airline traveller is the same whether the respondent's intent in adopting its name was innocent, Resp. Br., p. 38, or not.[7] That the question is quite irrelevant to the interest of airline travellers is forcefully brought out by the fact that it was found on this very record that the respondent's own president recognized the travellers' confusion and, when passengers were destined to a point served by the respondent, would do "everything he could to 'steal' them." R. 223; Sol. Gen. Br., p. 17, n. 6; Pet. Br., p. 13.

Additionally, however, the respondent's argument overlooks the all-important fact that the public can be harmed by use of a trade name just as much as by the use of any other advertising practice. This is the reason that there have always been Section 5 cases involving use of trade names, Sol. Gen. Br., pp. 12-13; Pet. Br., p. 25, and in not a single case has a court even hinted that the Trade Commission has exceeded its jurisdiction because the controversy involved a trade name. If ever a case invited decision on that ground it was *Klesner;* but *Klesner* turned on the lack of any real public concern in the particular fuss between the shade shops.

Indeed, in air transportation, as distinguished from miscellaneous business, there is a special public inter-

[7] The respondent's brief, at p. 38, implies that the Board "sustained" the Examiner's finding that there was no evidence that the respondent adopted its name "with intent to deceive . . ." This is not quite accurate. The Board did not adopt that finding; indeed it pointed out that the respondent's case is hardly one of wide-eyed innocence. Sol. Gen. Br., pp. 17-18; Pet. Br., pp. 16-17.

est in the carriers' names. Sol. Gen. Br., p. 15. The public, in getting where it wants to go without delay, is wholly dependent on the distinctiveness of the name by which an airline advertises itself; and the very conditions of a regulated industry, especially the airlines, where fares and many other details of service tend more and more toward uniformity, lead to ever increasing emphasis upon name advertising in the competitive struggle and in relations with the public. R. 10, 229.

The reasons for the Board's concern with name confusion—in order to protect the public—were fully stated in the Board's findings, Pet. Br., pp. 13-14, and in its Business Name Regulation, *id.*, p. 8. See also Appendix, *infra*, pp. 25-26. It detracts in no degree from this interest that a confusingly similar name might also violate a private right. That is common to various unfair practices or methods.[8] Nor is the public interest any the less because from its vindication a private interest might benefit; the *Klesner* case itself recognized that. *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 27 (1929); see also *E. B. Muller & Co.* v. *Federal Trade Commission*, 142 F. 2d 511, 520 (6th Cir. 1944).

Furthermore there is nothing in the particular facts of this case suggesting that it falls short of the *Klesner* standard of public interest—however significant that decision may be today. On the basis of the Board's findings, fully supported by its Examiner, a very im-

---

[8] E. B. Muller & Co. v. Federal Trade Commission, 142 F.2d 511 (6th Cir. 1944); Moretrench Corp. v. Federal Trade Commission, 127 F.2d 792 (2d Cir. 1942); *cf.* Independent Directory Corp. v. Federal Trade Commission, 188 F.2d 468 (2d Cir. 1951).

portant public was directly affected on one of the leading air routes. Here is a much greater interest than the sufficient public interest found to exist among the customers of a half dozen flour blenders in Nashville, Tennessee, *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212 (1933), or among an undetermined number of purchasers of an undetermined portion of 7,000 yards of cloth in New York City, *Gimbel Bros.* v. *Federal Trade Commission*, 116 F. 2d 578 (2d. Cir. 1941), or among an undetermined number of purchasers of 5800 radio sets over a period of five years, *Pep Boys—Manny, Moe and Jack* v. *Federal Trade Commission*, 122 F. 2d 158 (3d Cir. 1941). The record here discloses a constant stream of people every week being subjected to all the ills flowing from name confusion. Sol. Gen. Br., pp. 16-18; Pet. Br., pp. 11-13, 29-31, and n. 20.

The Board's elaborate findings, much more careful and detailed than those to be found supporting Trade Commission orders, make it very clear that the public interest here is *not* the mere general community interest in vindicating private rights—the interest held inadequate in *Klesner*, 280 U.S. at 28. On the contrary the findings show unmistakably and explicity that the Board took action in order to discharge its responsibility to protect air travellers on common carriers from costly confusion, inconvenience, delays, and outright imposition at busy airports. The respondent would have this responsibility discharged by the vagaries and chances of private litigation by competitors willing to sue in various state and federal courts under the technical law of trademarks and common law unfair competition. The Civil Aeronautics Act was never meant thus to ignore the interest

of the transient common carrier patron and to deny him the protection of public law. The respondent's argument professes to repudiate *Gratz* and *Baladam*; but the philosophy of those discredited cases echoes in its thesis. For on that thesis only the competitor, and then only in a common law case, would have relief.

The respondent's brief conspicuously ignores the findings and the record here, relying only on the fact that there was no finding of positive fraud—an irrelevant point. Resp. Br., p. 38. But see Pet. Br., pp. 16-18. A passage of the respondent's brief carries the heading, "The Lower Court Correctly Found that the 'Confusion' Was Unsubstantial . . . " Resp. Br., p. 38. But the very short discussion that follows on that page does nothing but refer to that paragraph of the lower court's opinion which points out that there was no evidence that the respondent adopted the name with intent to defraud or had "palmed itself off" or had actually "enticed" passengers to the injury of the petitioner. This passage of the opinion was responsive to the respondent's vigorous argument below that fraud and a showing of loss of business by the petitioner were essential to the validity of the order; in not the slightest degree does it impair the detailed findings of fact of both the Board and the Examiner showing the extensive, constant, and serious misleading and confusion suffered by the travelling public. R. 201, 204-205, 221-223; Sol. Gen. Br., pp. 5-6; Pet. Br., pp. 11-13. The respondent's brief blinks these findings.

The only other matter, addressed to the facts of this case, to which the respondent adverts is what it terms the case's procedural history. Resp. Br., pp.

37-38. The respondent finds fault in the fact that the petitioner produced the evidence at the hearing before the Board's Examiner. But since Section 411 provides for a private complainant, this is not surprising.[9] And the Government attorney not only participated in the questioning but vigorously briefed and argued the case on the basis of the record made. Both the

[9] Civil Aeronautics Board practice is different from Trade Commission practice, not only in Section 411 matters but in the entire administration of its Act, a difference arising from the quite different pattern of regulation in the two statutes. While, of course, private persons bring matters to the attention of the Trade Commission, only the Commission staff proceeds with and participates in a case. The statement in the respondent's brief that, in Section 5 Trade Commission cases, "interventions have frequently been sought and permitted in recent years," Resp. Br., p. 25, n. 16, is inaccurate. Reported materials give no support for this statement, which is made without citation, and inquiry at the Trade Commission confirms the fact, well known among practitioners, that allowance of intervention in such cases is virtually unknown, except that intervention for the purpose of filing a brief and making argument (amounting to, and usually designated as, an appearance *amicus*) has been permitted on extremely rare occasions. The intervention permitted to the State of Florida in the *Florida Citrus* case, referred to by the respondent, reflected a very unusual situation. The regulatory pattern of the Civil Aeronautics Act, on the other hand, is such that, even though the over-riding and controlling considerations guiding Board action are always those composing the "public convenience and necessity" and the "public interest", see Section 2 of the Act, 49 U.S.C. § 402, adversary participation by private parties on a full scale basis in Board cases is very frequent indeed. As a matter of fact, the Act contains a general provision for private complaints "with respect to anything done or omitted to be done by any person in contravention of any provision of this Act, or of any requirement established pursuant thereto." Section 1002(a), 49 U.S.C. § 642(a); *cf.* Section 1002(c), 49 U.S.C. § 642(c). This, of course, is in addition to the specific provision for private complaints in Section 411. As we have said

Examiner's findings and the Board's own opinion show a very clear understanding of the fact that their interest was in the public and not in the petitioner. R. 197, 207, 208. The clarity of this understanding, indeed, is emphasized by the fact that no effort was made to offer proof or to make findings on the extent to which the petitioner actually lost business. Sol. Gen. Br., p. 20, n. 10; Pet. Br., pp. 17-18. Neither the respondent's argument nor anything in the *Klesner* case can condemn the Board's conclusion: ". . . we have determined that the *public* should be protected from the effects of the confusion shown on the record by eliminating what we find to be the cause of such confusion." (Emphasis added.) R. 209.

II.

The Belated Issue on the Scope of the Order

In its reply brief in this Court the respondent objects, for the very first time in this case, to the scope of the Board's order. The order requires the respondent to cease using the North American name "or any other name which includes the word American." R. 230, 211. The same requirement was recommended by the Examiner in his initial decision. R. 199. The

---

in another connection, the context of Section 411 in the Civil Aeronautics Act is quite different from that of Section 5 of the Trade Commission Act. Pet. Br., pp. 35-38; *supra*, pp. 4-7.

Even in the case of the National Labor Relations Board, where private persons can only make "charges" of unfair labor practices and the complaint itself is filed by the General Counsel, a private person making a charge becomes a full scale party to the case. N.L.R.B. Rules and Regulations—Series 6, Secs. 102.8 and 102.38. *Cf.* also Associated Industries v. Ickes, 134 F. 2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

respondent, urges that to require dropping the word "American" is too drastic a sanction. Resp. Br., pp. 46-47. The point is an afterthought—too belated.

Both in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212 (1933), and in *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608 (1946), on which respondent relies, the question as to the scope of the order was properly raised both before the administrative agency, *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 215 (1933); *Jacob Siegel Co.*, 43 F.T.C. 256, 261, 265 (1946), and before the lower court. Not so here.

Respondent spoke not a word on the question at the Board's hearing. Nor in a long brief filed with the Examiner was the point mentioned by the respondent. Both the Government's brief to the Examiner and the brief to him filed by the petitioner specifically requested an order of the breadth in question. The Examiner, as we have seen, so recommended. In exceptions to the Examiner's initial decision, comprising over forty pages, the respondent took no exception on that ground. In the respondent's brief to the Board it made no mention of the point. The transcript of its oral argument to the Board discloses no mention of the issue.

Only at the end of the opinion of the dissenting Board member was there any mention of the possibility of a less sweeping order. Even then the possibility mentioned was only that the respondent might "make more clear in its advertisements and contact with the public that it is not to be confused with American Airlines." R. 217. It is not difficult to understand why this should not have been persuasive to the

majority in view of its findings, referred to by the dissenter, that the respondent had changed its name with its eyes open and with obvious possibilities of confusion, R. 207, 228-229, to say nothing of the findings as to the nature and degree of confusion which continued even "after an explanation had been made that American and North American were two different airlines." R. 222. Nor is there here a case of the respondent's having invested many years' use of the name, as in the *Royal Milling Co.* and the *Siegel* cases: *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 217 (1933); *Jacob Siegel Co.* v. *Federal Trade Commission*, 150 F. 2d 751, 752 (3d Cir. 1944). The respondent had changed its name very recently—as well as very deliberately. R. 207, 218, 228-229.

In any event, and even despite the dissenter's mention of the scope of the order, the respondent filed no petition for reconsideration with the Board and did not tender the issue to the lower court. By specific stipulation, the issues *were framed and limited at the pre-hearing conference in the lower court and included no such question.* R. 307-308.

In this petitioner's brief in the lower court attention was specifically invited to the fact that this issue was not presented. The respondent's brief in that court did not mention the point. Nor did it mention the point at the argument in that court.[10]

[10] All of the several steps referred to are reflected in written documents, except that there is no transcript of the oral argument in the lower court. The record here, of course, does not contain all of these documents because no such question was presented to the lower court. The transcript of record actually certified by the Board to the lower court does include them. If the question had been raised below, the record here would have included appropriate excerpts from the relevant documents.

Nor did the lower court's opinion mention the point."

In the Petition for Certiorari no such issue was framed. Indeed, the Petition specifically pointed out that no such issue had been raised by the respondent in this case. Pet. for Cert., p. 14, n. In respondent's Brief in Opposition no such issue was raised and no exception was taken to the statement in the Petition that the point had not been raised.

If ever an issue were belated—and waived—this issue is such.

Section 1006(e) of the Civil Aeronautics Act which provides for judicial review of Board orders requires that:

> ". . . No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so." 49 U.S.C. § 646(e).

The respondent obviously has no grounds for its failure to raise before the Board the point now made.

Moreover, issues will not be considered here which were not raised below. *Sonzinsky* v. *United States*, 300 U.S. 506, 514 (1937); *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 186 (1935).

To tolerate the respondent's raising of new issues at the eleventh hour would open the way to tactics

[11] Erroneous is the statement in the respondent's brief, at pp. 47 and 51, that the lower court dealt with this issue. It is not mentioned in the opinion below—which perhaps explains why the respondent cites no passage in that opinion.

whereby battles could be lost but wars won. The tactics of delay, of stringing proceedings out by raising first one issue and then another, while protected, as is this respondent, by stays of attempted administrative orders, can make administrative process futile. This very proceeding—in a seemingly simple case, so simple, indeed, that the respondent itself introduced very little evidence at the Board hearing—has already lasted for nearly three and a half years. Surely it is time that the proceeding reach an end.

Respectfully submitted,

HOWARD C. WESTWOOD,
J. RANDOLPH WILSON,
Attorneys for Petitioner.

COVINGTON & BURLING
Of Counsel.

APPENDIX

THE IRRELEVANCE OF THE RESPONDENT'S "PRELIMINARY OBSERVATION"

Respondent's so-called "Preliminary Observation", Resp. Br., pp. 11-17, sets forth a highly selective and inaccurate discussion of "background" which, it insinuates, shows that the Board in the present case was acting in the interest of the petitioner rather than of the public, furthering efforts to "eliminate [repondent] from the air transport industry" as part of an alleged policy of the Civil Aeronautics Board to exclude from air transportation of passengers all but the air carriers who received grandfather certificates.

There is quite another side to the respondent's version of the "background." Within the United States, the Board has certificated more than a dozen new "local service" carriers which operate thousands of miles of routes, competing with grandfather carriers over some segments and actually supplanting grandfather carriers over others;[1] indeed these carriers are larger than many of the grandfather carriers were when the Act was adopted.[2] In Hawaii and in the Caribbean, the Board has certificated direct competi-

---

[1] See, *e.g.*, United Air Lines v. CAB, 198 F. 2d 100, 103-104 (7th Cir. 1952); Western Air Lines v. CAB, 196 F. 2d 933, 936 (9th Cir. 1952).

[2] Last year these "local service" airlines together carried more revenue passenger miles than did all domestic grandfather airlines together in 1938. Even the smallest of these "local service" airlines carried more revenue passenger miles last year than did 10 of the 16 domestic grandfather carriers in 1938. *Annual Airline Statistics, Domestic Carriers, Calendar Years 1938-1942*, Table I (CAB, Economic Bureau, Rates and Audits Division 1943); *Summary of U.S. Local Service Airline Traffic For Calendar 1955*, American Aviation Daily, February 15, 1956.

tion with grandfather carriers by new carriers of passengers and cargo.[3] In domestic and foreign cargo transportation, the Board has certificated numerous non-grandfather carriers which carry a very large share of the cargo traffic.[4] In all, the Board has certificated some 39 "non-grandfather" carriers since 1938.[5] This is in addition to forty-odd large irregular carriers authorized by the Board, operating both domestically and abroad, who have for years been competing most effectively with grandfather carriers, and whose authorizations have recently been vastly expanded. *Large Irregular Air Carrier Investigation*, CAB Order No. E-9744 (Mimeo.), November 15, 1955.[6]

Several of the grandfather carriers which were actually local service carriers in 1938 have been greatly expanded and transformed into highly competitive trunkline operators.[7] And among the grandfather

---

[3] See, *e.g.*, Hawaiian Intraterritorial Service Case, 10 C.A.B. 62 (1948); Caribbean Area Case, 9 C.A.B. 534 (1948); Florida-Bahamas Service Case, 15 C.A.B. 884 (1952).

[4] See, *e.g.*, CAA Statistical Handbook of Civil Aviation, 1955, p. 90 (U.S. Dep't Commerce, 1955); North-South Air Freight Renewal Case, CAB Order No. E-9760 (Mimeo.), November 21, 1955; Transatlantic Cargo Case, CAB Order No. E-9311 (Mimeo.), May 19, 1954; Additional Service to Puerto Rico Case, 12 C.A.B. 430 (1951); Air Freight Case, 10 C.A.B. 572 (1949).

[5] *Aviation Study*, Sen. Doc. No. 163, 83d Cong., 2d Sess. 32-33 (1955).

[6] This case is now on appeal in the United States Court of Appeals for the District of Columbia Circuit, No. 13044.

[7] *Aviation Study*, Sen. Doc. No. 163, 83d Cong., 2d Sess. 32-34 (1955). The *Study* contains data and references to data submitted by the Board to show the development of several small grandfather carriers from sizes smaller than today's "local service" carriers. See also n. 2, *supra*. Since these data were prepared the Board has made substantial additional grants to several of these carriers.

carriers, both in the international and in the domestic field, the degree of direct competition has been intensified incalculably since the adoption of the Act. For example, there are now as many as seven carriers certificated between New York and Washington, five between New York and Chicago, four between Chicago and Los Angeles. Neither in rail nor in motor bus transportation is there even remotely comparable competition in degree, extent, and intensity.

Respondent claims to be the innovator of air coach service, saying that "It is common knowledge by now" that save for the non-certificated carriers, "particularly this respondent", there would have been long delay in the inauguration of coach service which the certificated carriers resisted "until quite recently." In support of this astounding statement, the respondent quotes from testimony before a Senate Committee by presidents of two of the large airlines stating their concern about experimenting with coach service in May, 1949. Resp. Br., p. 15. What the respondent fails to point out—among a great many other things—is that in the spring of 1949 the certificated carriers were just emerging from a shocking financial crisis growing, in large part, out of their re-equipment program after the War during which they moved from obsolete DC-3's and DC-4's to a new technological stage involving DC-6's and Constellations, among others. Problems encountered included even the grounding of million dollar airplanes until the source of mysterious fires in

---

See New York-Chicago Service Case, CAB Order No. E-9537 (Mimeo.), September 1, 1955 (Capital Airlines); Denver Service Case, CAB Order No. E-9735 (Mimeo.), November 14, 1955 (Continental Air Lines, Western Air Lines); Southwest-Northeast Service Case, CAB Order No. E-9758 (Mimeo.), November 21, 1955 (Braniff Airways, Capital Airlines, Delta Air Lines).

the air was ascertained. During this period, the Civil Aeronautics Board did insist that low-fare "coach" service by certificated carriers be confined to off-peak night time periods, and was cautious in its fare policy. But one of the very carriers whose president is quoted in the respondent's brief, this petitioner, by the fall of 1949 filed and vigorously supported a tariff which provided not only for full scale coach service without regard to off-peak periods but also for such service in the most modern aircraft, the DC-6. And the CAB was persuaded to allow that service.[8] The coach service thereafter grew rapidly and constitutes 35.3% of the business of the domestic certificated carriers and 65.7% of the U.S. flag carriers operating internationally as of the twelve months ending September 1955.[9] The respondent's claim to pioneering, made in its brief, rests on the fact that certain of its predecessors, during the time that the certificated carriers were involved in their financial and technological problems of transition to entirely new equipment; operated a limited amount of low fare service with a few obsolete war surplus two-engine craft which they had bought for a song. If the certificated carriers had followed the lead of the respondent's predecessors they would properly have been subject to most severe criticism for retarding, instead of accelerating, the development of modern air transports. Finally, it should be noted that the Senate Interstate and Foreign Commerce Com-

---

[8] See Transcontinental Coach-Type Service Case, 14 C.A.B. 720, 725 (1951); National Airlines, DC-6 Daylight Coach Case, 14 C.A.B. 331, 336 (1951); American Airlines, Mail Rates, 10 C.A.B. 341, 342-343 (1949).

[9] *Certificated Air Carrier Traffic Statistics*, September 1955, pp. 9-10 (CAB, Office of Carrier Accounts and Statistics, 1955).

mittee staff, after considerable study of this whole question, concluded:

> "Whether the nonskeds have as they claim, brought new ideas and initiative into the business does not seem to require a categorical answer for present purposes, even assuming that the question is capable of such an answer. That their presence, and tactics, have resulted in an intensification of competition in the industry is clear. But it is far from clear that the net results of the intensified competition, and the competitive practices employed, have advanced us further toward the ultimate objectives laid down in the Civil Aeronautics Act, and which stand unquestioned today. There is persuasive evidence that ground has been lost."[10]

Respondent quotes recent testimony by a professor before a Congressional committee referring to "a death sentence" on the respondent, in which the professor gives the definition of the respondent's "crime" supplied by "one of its officials." Resp. Br., pp. 14-15. This is a reference to a case in which the Civil Aeronautics Board found a long record of willful and flagrant violation of law by the respondent. *Compliance Proceeding, Twentieth Century Airlines*, CAB Order No. E-9360 (Mimeo.), July 1, 1955. As appears from the Board's opinion in this *Compliance Case*, the respondent, and its affiliated interests, have persisted in a course of illegal operation, involving, among other things, provision of regular service without securing a certificate of convenience and necessity as required by the Act. This same course of conduct goes back even to two predecessor companies, as referred to in the opinion in the *Compliance Case*, both of whose

[10] *Aviation Study*, Sen. Doc. No. 163, 83d Cong., 2d Sess. 47 (1955).

operating authorities were revoked for similar violations. *Id.* at pp. 18 and 22. As the Board saw the question, it was whether the respondent, by main force and defiance, would dictate what air service there should be or whether the Act of Congress should do so. *Id.* at pp. 19-21.[11] The Board's opinion sets forth the facts at length.

The *Compliance Case* is now on appeal as No. 12858, in the United States Court of Appeals for the District of Columbia Circuit, where the record has been fully briefed and argued on both sides and the case is pending decision.

Arguments along the lines of respondent's "Preliminary Observations" are also being made by the respondent in its appeals of three route certificate cases also pending in that Court where, again, records are being fully briefed and argued. Court of Appeals Nos. 12942, 13053, 13132, cited in Resp. Br., p. 12 at

---

[11] It is of some interest, also, to note that, in one of the compliance cases involving a predecessor company, the attitude toward the law, prompting violation, is disclosed as follows:

> "Upon being confronted with the above information, respondent made no attempt to adjust its operations to conform with the Board's regulations. Instead it announced to the Board's representative, through its vice president, that no adjustments in operations were contemplated and if any adjustments were made *they would have to be in the Board's regulations.* The attitude of respondent as displayed by this announcement is consistent with the course of conduct it followed in operating its aircraft prior to and after March 1948." Standard Air Lines, Noncertificated Operations, 10 C.A.B. 486, 497 (1949) (Emphasis added).

See also Viking Airliners, Noncertificated Operations, 11 C.A.B. 401 (1950). These are the two cases, involving predecessor companies, to which the Board referred in its opinion in the respondent's *Compliance Case.*

end of n. 5.[11a] In the decisions there appealed, the Board denied the respondent's applications after full comparative hearings of the applications of the respondent and of numerous other carriers, on the ground, among others, that strengthening certain of the smaller carriers by extending them into new territory would better serve the public interest than provision of such service by the respondent. Also important to the Board's comparative decision in these cases was its finding as to the unfitness of the respondent based upon a record of willful and flagrant violation of the law detailed at length in the *Compliance Case*. See, *New York-Chicago Service Case*, CAB Order No. E-9537 (Mimeo.), September 1, 1955, pp. 26-28; *Denver Service Case*, CAB Order No. E-9735 (Mimeo.), November 14, 1955, pp. 17-18; *Southwest-Northeast Service Case*, CAB Order No. E-9758 (Mimeo.), November 21, 1955, pp. 33-35.

The point of the matter, of course, is that the respondent is carrying into the brief in this Court an attack on the Board and its motives which the respondent is making in connection with these other cases.

But the present case has not the remotest connection with those cases. Not only is there not a syllable in the record here which suggests any basis for the attack which the respondent makes, but the case itself has absolutely nothing to do with any issue as to whether the respondent will continue in business. It involves nothing but the question whether the respondent's change of name to North American was proper. There is not even a suggestion, in this record or in the

[11a] Respondent's brief incorrectly states the Court of Appeals No. for the first of these cases as 12947.

Board's opinion, that there is anything illegal in the respondent's mode of doing business.

The real "background" of this case is simply this: Among the irregular carriers a problem arose involving confusion to the public from the use of various names which the Board had to attempt to straighten out through the appropriate exercise of its regulatory power. Pet. Br., p. 8. The Board leaned over backward to avoid interfering with names actually in use save where a Section 411 case would be made out, after notice and hearing. *Idem.* One other such case has been decided by the Board with an opinion which discloses the obvious public interest in the question. *Id.* at p. 28, par. (a) in n 19. Only recently, in a decision greatly enlarging the scope of the authority of irregular carriers, and permitting even scheduled operations within certain limits, the Board again referred to the problem, saying:

> "In view of the enlarged authority, the public interest requires that safeguards be established to prevent confusion in the minds of travelers as to the identity of the carrier with whom they are arranging for transportation. Such confusion can result from the fact that some supplemental air carriers have names or operate under names similar to those of certificated carriers. We shall therefore provide, as a condition to the exercise of the authority contemplated herein, that an applicant whose name is similar to that of a certificated carrier shall change its name."[12]

Indeed, so careful is the Board that, on reconsideration of this decision, it provided that it would not impose the foregoing as a condition to operating author-

[12] Large Irregular Air Carrier Investigation, CAB Order No. E-9744 (Mimeo.), November 15, 1955, p. 31.

ity, but would rely on notice and hearing procedures under Section 411 which "is designed to correct this very mischief and is ample in scope to meet the problem involved." The Board insists upon following the full Section 411 procedure even in a case where one carrier uses the name "Capitol Airways" whereas one of the certificated carriers is named "Capital Airlines".[13]

The "background", then, is nothing more than the Board's determination to apply Section 411 so as to protect the travelling public from confusion, and has not the remotest connection with some alleged plot to drive anyone out of business. The respondent conjures up such a plot in connection with other cases, now pending in the Court of Appeals, as a result of which it will ultimately be determined whether and on what basis the respondent will continue in business. That question—important as it is to the respondent and to the principles which are to govern the administration of the Act in other connections—should not be permitted to obscure the issue in the present case. For here are questions under Section 411, affecting the travelling public in its daily contact with all types of carriers, the answer to which will determine whether the Board is or is not to have power to eliminate conditions which cause the traveller incalculable trouble, expense, and inconvenience in trying to get where he wants to go on the airline of his choice.

[13] Supplemental Opinion on Reconsideration, Large Irregular Air Carrier Investigation, CAB Order No. E-9884 (Mimeo.), December 29, 1955, p. 20.